JAN 25 1921
JAMES D. MAHER,
Clerk.

Supreme Court of the United States

JANUARY TERM, 1921.

No. 28 Orig.

In re

IN THE MATTER

OF

THE NATIONAL PARK BANK OF NEW YORK,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

LOUIS E. DOYLE,
I. H. BURNEY,
R. W. FLOURNOY,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States.

JANUARY TERM, 1921.

No.....

Ex Parte
In the Matter
of
NATIONAL PARK BANK OF NEW YORK,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

Comes here now National Park Bank of New York, by its attorneys, and moves the Court for leave to file a petition for writ of mandamus directed to the Honorable Richard W. Walker, Chief Justice of the United States Circuit Court of Appeals for the Fifth Circuit, and to the Honorables Nathan P. Bryan and Alex. C. King, Justices of said Court, which petition is annexed hereto.

LOUIS F. DOYLE,
I. H. BURNEY,
R. W. FLOURNOY,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

JANUARY TERM, 1921.

No.....

Ex Parte
In the Matter
of
NATIONAL PARK BANK OF NEW YORK,
Petitioner.

PETITION FOR MANDAMUS.

TO THE HONORABLE EDWARD DOUGLAS WHITE, CHIEF JUSTICE OF UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, National Park Bank of New York, respectfully represents:

The purpose of this application is to procure from the Honorable Circuit Court of Appeals, for the Fifth Circuit, the exercise of its jurisdiction to dispose of a case before it, in which petitioner is a party, wherein, by want of finality in the decree as entered by the Circuit Court of Appeals your petitioner is without remedy to proceed for a review of said decree or for further action in the trial court. The statement subjoined is confined to a presentation of the issues before the Circuit Court of Appeals requiring its judgment, and to the proceedings of that Court, and has no reference to the merits.

The jurisdiction of the trial court rested on diverse citizenship.

Said National Park Bank of New York is a banking corporation incorporated under the United States National Banking Laws, having its principal office and domicile and place of business in the City of New York in the State of New York, and is a citizen of the said State of New York.

On, to-wit: the 19th day of December, 1916, said National Park Bank of New York filed in the District Court of the United States for the Northern District of Texas, in the cause of National Park Bank of New York vs. Reid Cattle Company, et al, No. 40 In Equity in said court, its bill of complaint against said Reid Cattle Company, a corporation organized under the laws of Texas and a citizen of Texas, and against the City of Fort Worth, a municipal corporation chartered and organized under the laws of Texas, situated in the said state, in the county of Tarrant of which it is the county seat, and certain other individual defendants, all of said defendants being citizens of Texas. The amount in controversy in the case, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

The substance of the complaint in said bill was that the Reid Cattle Company had ceased to do business, was not a going concern, and was insolvent; that its business as formerly conducted when it was a going concern, was a cattle business in which the corporation grew and dealt in live stock and in that connection owned and used a ranch in west Texas which had included the lands in controversy in this case, consisting of about forty-three sections in all and a total of approximately 30,000 acres; that the larger part of said lands were conveyed to the Reid Cattle Company in June, 1911, by one Reid and one Baldridge, in part payment by them to the Reid Cattle Company for the larger part of the shares of the capital stock of the said corporation on its organization, they having all the shares except one issued to another person for

the purpose of organization. That in November or December of 1911, Reid and Baldridge on account of some rumor to that effect, had the erroneous notion that no corporation was competent to acquire or hold title to unpatented public school lands of Texas, which was the character of virtually all the lands in controversy, and that the title of the Reid Cattle Company to said lands was on this account subject to forfeiture by the state, and in an attempt to remedy this supposed defect they, the said Reid being then the president and the said Baldridge being the vice-president of the Reid Cattle Company, made on December 7, 1911, through a deed signed "Reid Cattle Company by R. T. Reid, President," a pretended conveyance of a large part of the lands to Reid and Baldridge as individuals, and on August 25, 1914, made a similar deed in the name of the corporation to Baldridge, attempting to convey certain of said lands omitted from the first conveyance made. That by said conveyance it was intended to convey to and vest in Reid and Baldridge, the said titles in trust for the Reid Cattle Company, and that the said titles remained and were intended to remain the property of said corporation, it holding still the full equitable title thereto; that after these conveyances the land so conveyed remained in the possession and under the control of the Reid Cattle Company as before, as a fundamental asset for the carrying on of its business.

In this bill it was alleged further, that of the lands in controversy, one section of 640 acres, known as the "Davidson" section, had been conveyed by one Davidson to Reid and Baldridge by deed dated October 13, 1913, reciting a consideration paid wholly by the Reid Cattle Company, and that the said consideration was in fact paid by the Reid Cattle Company, and the intention and purpose of the conveyance was to vest in the grantees the title in trust for the Reid Cattle Company, the equitable title to said Davidson section being in the Reid Cattle Company.

It is alleged that there was no consideration moving to the Reid Cattle Company for any of the aforesaid conveyances; that by a deed executed in June, 1914, and a supplemental deed in August, 1914, covering lands omitted from the first named deed, Reid conveyed to Baldridge the lands, or Reid's interest therein, which had been previously conveyed to Reid and Baldridge as aforesaid, the intention of said conveyances from Reid being to vest in Baldridge the nominal title which had theretofore been held by Reid and Baldridge, so that the lands would be thereafter held by Baldridge for and on behalf of the Reid Cattle Company. That if the said conveyances from Reid to Baldridge were not so intended, they were a fraudulent repudiation of the trust then existing by which the entire beneficial interest in the lands was in the Reid Cattle Company. That in July, 1915, Baldridge conveyed to certain trustees, for their benefit and for the benefit of certain other defendants named in the bill of complaint (not including the Reid Cattle Company), all the lands in controversy to secure the said beneficiaries against their contingent liability as sureties on certain bonds which had been executed to the defendant City of Fort Worth to protect deposits by the treasurer of said city in a bank of which Baldridge was president; that in September, 1915, the said trustees, in a settlement with the City of Fort Worth of their liability on said bonds, conveyed all the lands in controversy to the said city.

It was alleged that the National Park Bank at the date of the deed of August 25, 1914, from the Reid Cattle Company to Baldridge, was a creditor of the Reid Cattle Company, which had then other creditors; that when the deed was made from Reid to Baldridge in June, 1914, and continuously thereafter, the Reid Cattle Company was indebted to the National Park Bank and other creditors, and without the lands in controversy was then and thereafter, hopelessly insolvent, and at the date of the conveyance from Baldridge to the trustees in July,

1915, had ceased to do business and was virtually in a state of dissolution; that the National Park Bank had a claim against the Reid Cattle Company on notes dated in November, 1914, amounting to $95,000 principal, which claim was by National Park Bank reduced to judgment against the Reid Cattle Company in September, 1915, the amount of the judgment being $113,254.00, with interest and costs to be added, which judgment had been abstracted in due form in the counties where the lands in controversy lay, in September, 1915, thereby creating a lien on said lands; that execution had been issued on the said judgment and returned *nulla bona*, and no assets of the Reid Cattle Company in its name could be found.

The suit was to declare the trust in favor of the creditors of the Reid Cattle Company on the lands in controversy, as against the City of Fort Worth claiming the title, and the other defendants, on averments that none of the vendees in the conveyances in controversy were innocent purchasers for value; and the prayer was that the defendants in possession of the conveyances about which complaint was made, be required to deliver them up for cancellation, that the City of Fort Worth be required to execute appropriate releases in favor of the Reid Cattle Company in order that the lands might be made subject to execution or other proceeding against the Reid Cattle Company on the part of the National Park Bank, and other creditors if so entitled.

The defendants other than the City of Fort Worth disclaimed interest or made no defense. The City of Fort Worth by its answer denied that the conveyances to Reid and Baldridge were made for the purpose of placing the legal title in trust for the Reid Cattle Company or were in fraud of creditors of the Reid Cattle Company—denied that Reid and Baldridge held the lands in trust for the Reid Cattle Company or that they recognized their holding of the title to the lands as trustees; denied that the conveyances were a fraudulent

repudiation of a trust and that the conveyance by Baldridge tc the trustees was a fraud on the title of the Reid Cattle Company, and alleged that the trustees and the City of Fort Worth were bona fide purchasers for value, without notice, and that the City had the full fee simple title to the lands.

By paragraph seven of its answer the City of Forth Worth specifically denies that the title to the Davidson section referred to above was vested in the Reid Cattle Company by the aforesaid conveyance from Davidson to Reid and Baldridge, and denied that it was intended by that conveyance to place the title to this section in Reid and Baldridge in trust for the Reid Cattle Company.

The trial court in its final decree entered July 15, 1918, decreed that the deed of December 7, 1911, from the Reid Cattle Company to Reid and Baldridge, and the deed of August 25, 1914, from the Reid Cattle Company to Baldridge, were intended to, and did vest in the grantees the titles to the lands therein described, in trust for the Reid Cattle Company, and that the full equitable title to the lands in said deeds described remained in that corporation; that the deeds from Reid to Baldridge, made in June and August, 1914, operated to create a trust in Baldridge for the benefit of the Reid Cattle Company, and that if there was any intention to the contrary in the execution of said last named deeds, such intention was a fraud on the Reid Cattle Company and its creditors, it being then insolvent and largely indebted to various creditors, among whom was the complainant National Park Bank. The trial court further decreed that the grantees in the deed of trust made by Baldridge in July, 1915, were not bona fide purchasers for value, and that there was no consideration for said deed of trust sufficient to support it as against the Reid Cattle Company and its creditors, and that the grantees and beneficiaries in said deed of trust had constructive

notice of the equitable title of the Reid Cattle Company to the lands in said deed of trust described; that the deed (made in August but delivered in September) from the trustees in the deed of trust to the City of Fort Worth, vested no title in the city as against Reid Cattle Company or its creditors; that the city in accepting said conveyance had both actual and constructive notice of the title of the Reid Cattle Company in the lands so conveyed to the city, and that the city was not a bona fide purchaser for value, and that the conveyance to it was, as to the Reid Cattle Company's creditors, fraudulent and void.

The trial court further found that the Davidson section was conveyed to Reid and Baldridge on a consideration paid by the Reid Cattle Company, and that the purpose and intent of Reid and Baldridge was to take and hold the title so conveyed in trust for the Reid Cattle Company, and that the full equitable title to the said Davidson section was and remained in the Reid Cattle Company, and that each and all the subsequent conveyances of said section through and by which the title to same was attempted to be vested finally in the City of Fort Worth, were fraudulent and void as against the Reid Cattle Company and its creditors. Thereupon the trial court decreed that none of the defendants other than the Reid Cattle Company had any title or interest in any of the lands in controversy, and made appropriate provision for the cancellation of various conveyances in issue as clouds on the title of the Reid Cattle Company, and directed the City of Fort Worth to execute and deliver to the Reid Cattle Company sufficient conveyance and release to divest the city of, and surrender to, the Reid Cattle Company all the title and interest in and to all the lands in controversy, providing that any claims for preference or liens, as between the creditors of the Reid Cattle Company against the lands, might be presented for adjudication in some other appropriate pro-

ceeding for the distribution of the assets of the Reid Cattle Company among its creditors.

From this decree the City of Fort Worth perfected an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, on assignments and specifications of error which attacked the decree of the trial court in all respects and sought to set aside that decree in its disposition of each and all of the parcels of land involved, and to confirm the title to all the lands in controversy in the City of Fort Worth.

The case was submitted on this appeal, to the said Circuit Court of Appeals at its sitting in Fort Worth in November, 1919, on briefs for the City of Fort Worth, appellant, and for National Park Bank of New York, appellee, in which the controversy as to all the lands involved in the suit was sought to be maintained by the parties according to their respective interests. Thereafter, on the 2nd day of December, 1919, in this cause numbered 3367 on its dockets, styled The City of Fort Worth, Texas, appellant, versus National Park Bank of New York and Reid Cattle Company, appellees, the said Circuit Court of Appeals entered judgment as follows:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;
>
> "On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby reversed in so far as it adjudged that the Cattle Company was the beneficial owner of the lands described in the deed of December 7, 1911; and affirmed in so far as it relates to lands described in the deed of August 25th, 1914, of the Cattle Company to Baldridge which had not previously been conveyed by the Cattle Company;
>
> "It is further ordered, adjudged and decreed that the appellant, the City of Fort Worth, Texas,

> and the surety on the appeal bond herein, Southern Surety Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court; and that the appellees, National Park Bank of New York, and Reid Cattle Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court."

The Davidson section referred to in the foregoing statement is not described in the deed of December 7, 1911, having been conveyed by Davidson to Reid and Baldridge on October 13, 1913; neither is said Davidson section described in the deed of August 25, 1914, from the Reid Cattle Company to Baldridge, and no disposition of or reference to it is contained in said judgment by the Circuit Court of Appeals.

In connection with said judgment, the Circuit Court of Appeals on December 2, 1919, filed its opinion in said cause, in the opening portion of which it is said:

> "On a bill filed by the appellee, National Park Bank of New York, which, in April, 1914, became a creditor of Reid Cattle Company, a Texas corporation (which will be referred to as the Cattle Company), it was adjudged that lands described in two deeds executed by the Cattle Company, one on the 7th day of December, 1911, which embraced *all the lands referred to except two small tracts, and the other on the 25th day of August, 1914, embracing the last mentioned tracts* (Italics ours), were liable to be subjected to the payment of debts owing by the Cattle Company, * * *."

As before stated, the said deeds did not embrace all the lands in controversy, Reid's apparent interest in the Davidson section having passed to Baldridge by a deed from Reid to Baldridge executed August 24, 1914, and hereinbefore referred to, the legal title to the Davidson section having never been in the Reid Cattle Company.

The court in its opinion concludes that,

> "The evidence fell far short of clearly and con-

vincingly showing that the making of the deed of December 7, 1911, was accompanied by an intention on the part of the grantees to hold the lands described in trust for the grantor. As to the lands the title to which did not *pass from the Cattle Company* (Italics ours) until the execution by it of the deed of August 25, 1914, the decree appealed from can be maintained on the ground that the Cattle Company then was insolvent, and its conveyance was not supported by such a consideration as would make the transaction valid as against the grantor's then existing creditors. The decree is reversed in so far as it adjudged that the Cattle Company was the beneficial owner of the lands described in the deed of December 7, 1911. It is affirmed in so far as it relates to lands described in the deed of August 25, 1914, of the Cattle Company to Baldridge which had not previously been conveyed by the Cattle Company.

AFFIRMED IN PART: REVERSED IN PART".

There is nothing in the opinion which can be applied to the Davidson section, and it is not disposed of or referred to therein.

Thereafter appellee seasonably presented a motion for rehearing in the Circuit Court of Appeals, in which the fourth paragraph of the assignment of errors is as follows:

> "No disposition is made in the judgment of this Honorable Court as disclosed by the opinion, of the lands conveyed to Reid and Baldridge by J. W. Davidson for a consideration paid by the Reid Cattle Company."

On January 13, 1920, order was entered denying the motion for rehearing.

Thereafter, a mandate issued from the Circuit Court of Appeals to the trial District Court, which was filed in the said District Court on the 2nd day of February, 1920, in which mandate it is recited:

"ON CONSIDERATION WHEREOF, It is now here

ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby reversed in so far as it adjudged that the Cattle Company was the beneficial owner of the lands described in the deed of December 7, 1911; and affirmed in so far as it relates to lands described in the deed of August 25, 1914, of the Cattle Company to Baldridge which had not previously been conveyed by the Cattle Company;

"It is further ordered, adjudged and decreed that the appellant, the City of Fort Worth, Texas, and the surety on the appeal bond herein, Southern Surety Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court; and that the appellees, National Park Bank of New York, and Reid Cattle Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court. You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to rights and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

"WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the Twenty-Seventh day of January in the year of our Lord one thousand nine hundred and twenty."

Thereafter, on the first day of November, 1920, the City of Fort Worth filed in the said District Court its motion for judgment by the District Court on the said mandate, in which motion the City asks for a final decree on the facts and the law as laid down in the opinion of the Circuit Court of Appeals, annulling the judgment rendered on the former trial, by which the beneficial title and ownership was decreed to be in the Reid Cattle Company as to the lands described in the deed of December 7, 1911, and follows this with a specific description of the land so included in said deed. The City further, in said

motion, tenders a deed from it to the Reid Cattle Company to the lands described in the deed of August 25, 1914, from Reid Cattle Company to Baldridge, as to which the Circuit Court of Appeals had affirmed the decree of the trial court. No reference whatever is made to the Davidson section in this motion for judgment.

Thereupon, in November, 1920, the Circuit Court of Appeals sitting then in Fort Worth at a regular term, your petitioner, before answering said motion of the City of Fort Worth and wholly at a loss as to how to proceed in said cause before the District Court, while the said motion was pending asked through its attorneys of record, of the Circuit Court of Appeals, by application in person to the Presiding Justice of said Court who had written the opinion in said cause and was then the only member of said Court who had sat in the decision of same (the other Judges of said Court being appointees since the hearing of the cause in the Circuit Court of Appeals), permission to file a motion in the Circuit Court of Appeals, which motion in writing signed by attorneys of record for appellees, was then exhibited. This motion set out the proceedings in the Circuit Court of Appeals as heretofore presented, and directed attention to the fact that the Davidson section was not disposed of in the judgment or opinion of that Court. It states further, the character of the motion for judgment filed by the City in the District Court and then pending, and pointed out that "there remains undecided and without judgment on the said appeal, the title to the said Davidson section, and the decree of this Honorable Court is not final." It was asked in the motion that the mandate be recalled by the Circuit Court of Appeals, and that final judgment be entered by that Court, "disposing of the said appeal with respect to the claims of the parties to the title to the said Davidson section, and that on said final judgment a new mandate issue to the District Court for the Northern District of Texas."

Thereafter the said motion was returned to the attorneys for appellees by the Clerk of the Circuit Court of Appeals, with the statement that permission to file the same had been refused. On inquiry of the said clerk by said attorneys, as to whether any entry or order would or could be made on the minutes of the Circuit Court of Appeals with respect to the motion or the refusal of permission to file it, the clerk answered that no such entry was in order.

The District Court has taken no action on the motion of the City of Fort Worth for judgment, pending this application to this Honorable Court.

Premises considered, your petitioner respectfully prays that a rule may be issued to the Honorable Richard W. Walker, Chief Justice of the United States Circuit Court of Appeals for the Fifth Circuit, and to the Honorables Nathan P. Bryan and Alex. C. King, Justices of said Court, to show cause why a writ of mandamus shall not be issued to require them to allow your petitioner's application to this Honorable Court and to certify here the record in said cause, and that, on their return to said rule, the writ of mandamus may issue, requiring the entry of judgment in the Circuit Court of Appeals disposing of said cause, and that your petitioner may have such other and further relief as the premises warrant.

NATIONAL PARK BANK OF NEW YORK,
By LOUIS F. DOYLE,
I. H. BURNEY and
R. W. FLOURNOY,
Its Attorneys.

STATE OF TEXAS, }
County of Tarrant, } ss.:

I. H. BURNEY and R. W. FLOURNOY, being first duly sworn, on oath depose and say that they are attorneys of record for National Park Bank, petitioner named in the foregoing petition, and that the matters and things set forth therein are true to the best of their knowledge, information and belief.

I. H. BURNEY,
R. W. FLOURNOY.

Subscribed and sworn to before me this 6th day of January, A. D. 1921.

R. M. WALTHALL,
Notary Public,
[SEAL] Tarrant County, Texas.

Office Supreme Court, U. S.
FILED
FEB 21 1922
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 28 ORIGINAL.

Ex parte

In the Matter of

NATIONAL PARK BANK,

Petitioner.

RICHARD W. WALKER,

NATHAN P. BRYAN,

ALEX. C. KING,

Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 28 ORIGINAL.

Ex parte

In the Matter of

NATIONAL PARK BANK,

Petitioner.

NOW COME Richard W. Walker, Nathan P. Bryan, and Alex. C. King, Judges of the United States Circuit Court of Appeals for the Fifth Circuit, in response to the order made in the above numbered and entitled matter on January 24, 1921, that cause be shown by them why the prayer of the petition in said matter should not be granted, respectfully say:

The case referred to in said petition, wherein the City of Fort Worth, Texas, was appellant, and the Petitioner herein, National Park Bank, was appellee, is not pending in the United States Circuit Court of Appeals for the Fifth Circuit; said case having been fully disposed of at a former term of said Circuit Court of Appeals,to-wit, the November, 1919, Term, which term was finally adjourned on September 1, 1920. The suggestion that the tract

of land referred to as the Davidson section was not disposed of by the judgment of said Circuit Court of Appeals was not, during the term at which said judgment was rendered, sought to be called to the notice of said Circuit Court of Appeals otherwise than by one sentence in a 24-page printed motion, the sole stated object of which was to obtain a rehearing of the entire case. That motion was denied on January 13, 1920. No motion that the mandate in said case be stayed or recalled, and that the judgment therein be modified, was made during the term at which said judgment was rendered. Permission to file the motion presented to said court during its November, 1920, Term at Fort Worth, was refused because it was first sought after the final adjournment of the term at which said case was fully disposed of.

It is respectfully submitted that the decree of said Circuit Court of Appeals in said case, and the mandate issued thereon, when read in the light of the opinion rendered in said case, 261 Fed. 817, had the effect of affirming the decree of the District Court only in so far as it concerned land the title to which remained in the Reid Cattle Company until it incurred an existing debt and became insolvent, and of reversing said decree in so far as it related to land, including said Davidson section, the title to which was vested in the sole owners of the stock of said Cattle Company before that Company incurred any existing debt. The object of said suit was to subject described land to the satisfaction of a debt incured by the Reid Cattle Company to the National Park Bank in April, 1914. Averments of the bill in the case

showed that long prior to the existence of that debt the title to the Davidson section was vested in the said sole owners of the stock of the Reid Cattle Company, never having been in the Reid Cattle Company so far as appears.

Respectfully submitted,

RICHARD W. WALKER,

NATHAN P. BRYAN,

ALEX. C. KING,

Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

FILED
MAR 14 1931
JAMES B. BRADY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 29 ORIGINAL

Ex parte

IN THE MATTER

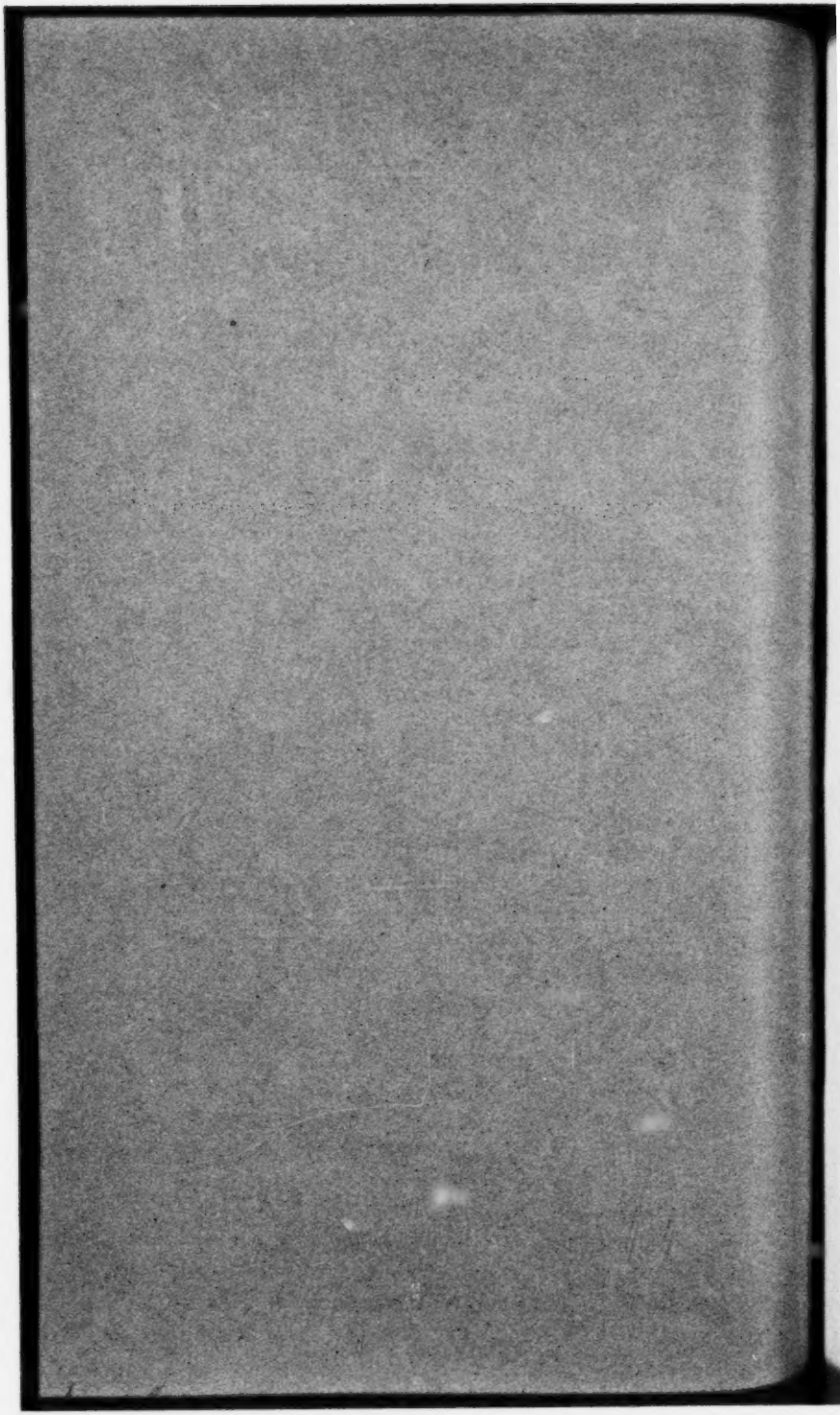
OF

THE NATIONAL PARK BANK OF NEW YORK,
Petitioner.

BRIEF FOR PETITIONER

LOUIS F. DOYLE,
I. H. BURNEY,
R. W. FLOURNOY,
Attorneys for Petitioner.

WM. GREEN, INC., PRINTERS, 9-15 MURRAY ST., N. Y.



WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 28, Original.

Ex Parte
In the Matter
of
THE NATIONAL PARK BANK OF NEW YORK,
Petitioner.

This is a motion for a writ of mandamus directed to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, requiring the entry of judgment in the Circuit Court of Appeals disposing of the cause of The National Park Bank of New York against The City of Fort Worth and others pending in said Court, upon the ground that the judgment entered in said Court does not finally dispose of the said case and is not a final judgment.

The National Park Bank, as petitioner, made a motion for leave to file a petition for writ of mandamus, upon which this Honorable Court issued a show cause order directed to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, directing them to show cause why the prayer of the petition should not be granted The rule to show cause was returnable on Febru-

ary 28, 1921, and before that date an answer was filed by the Judges.

In passing, it is to be noted that the answer was filed by Judges Walker, King and Bryan, and that the court which heard the appeal in the Circuit Court of Appeals and which rendered the opinion herein was composed of Judges Walker, Circuit Judge, and Foster and Grubb, District Judges.

The petition filed for the writ of mandamus fully sets forth the facts, and it is unnecessary to restate them in this brief. The facts as set forth must be taken as true. Not a single allegation is denied by the answer filed by the Judges of the Circuit Court of Appeals.

The answer filed by the Judges makes two points; first, while admitting that the Court's attention was called to the point now made, that the so-called Davidson section was not disposed of by the judgment during the term at which the judgment was rendered, that no motion was made to stay or recall the mandate during the term at which the judgment was rendered, but that a motion was presented after the term adjourned; and secondly, that the opinion, by inference, disposed of the so-called Davidson tract.

POINT I.

The petitioner has not been guilty of laches.

The answer filed by the Judges, after stating that the cause has been fully disposed of, begs the question, and petitioner will show in Point II that the judgment of the Circuit Court of Ap-

peals is not a final judgment, and, consequently, the matter has not been fully disposed of.

After having stated that the matter has been fully disposed of and is consequently a final judgment, the answer sets forth that the petitioner was guilty of laches, in that no motion was made to recall or stay the mandate or to have the judgment modified until after the adjournment of the term at which the judgment was rendered. In fact, the answer states that the motion was refused because it was first sought after the final adjournment of the term at which the said case was fully disposed of. The natural inference from this statement in the answer is that, if the motion had been filed before adjournment of the term, it would have been granted. If that is so, it is practically admitting that the Court did not dispose of the section referred to as the Davidson section, and, consequently, the matter was not fully disposed of and the judgment was, therefore, not a final judgment.

Of course, if the judgment of the Circuit Court of Appeals is a final judgment, the position taken by the Judges in their answer, that the motion was made too late, is sound. The petitioner does not question the well established rule that a final judgment cannot be set aside by the Court which rendered it on application made after the close of the term at which it was rendered. This has been well established since the decision of the case of *Brownson* vs. *Schulten*, 104 U. S., 410, and re-stated many times since by this Court.

Tubman vs. *Baltimore & Ohio R. R. Co.*, 190 U. S., 38.

But in those cases the rule was applied

to a case where the judgment in question was a final judgment. In other words, the Learned Judges, in the first point made in their answer, rest entirely upon the proposition that the judgment entered by the Circuit Court of Appeals was a final judgment. They take for granted the fundamental issue involved, namely, that since the judgment entered was a final one, the motion was made too late. This is reasoning in a circle, because the very question at issue is, Was the judgment of the Circuit Court of Appeals a final judgment? If it is admitted that it was, then their point is well taken, that the motion made to recall the mandate was made too late. Therefore, as supporting the idea that the judgment is final, they state the case is not pending in the United States Circuit Court of Appeals of the Fifth Circuit. That is true, if the judgment is final But if the judgment is not final, it is pending there

The difficulty with the first point made in the answer is that the Judges have assumed the entire question at issue, namely, the finality of the judgment of the Circuit Court of Appeals.

If the judgment of the Circuit Court of Appeals is not a final judgment, it is as much to the interest of the appellant as of the appellee that it be made a final judgment, and, therefore, laches or delay in seeking to have it made so is of no consequence. Laches is interposed as a reason for denying relief only when, because of it, injury or a change of position results to one of the parties.

POINT II.

The judgment of the Circuit Court of Appeals is not a final judgment.

The opinion of the Circuit Court of Appeals, 261 Fed., 817, in the opening paragraph states:

> "It was adjudged that land described in two deeds executed by the Cattle Company, one on the 7th day of December, 1911, which embraced all the lands referred to, except two small tracts, and the other on the 25th day of August, 1914, embracing the last mentioned tracts, were liable to the subject-ted to the payment of debts," etc.

At the conclusion of the opinion it reads as follows:

> "The decree is reversed in so far as it adjudged that the Cattle Company was the beneficial owner of the lands described in the deed of December 7, 1911. It is affirmed in so far as it relates to lands described in the deed of August 25, 1914, of the Cattle Company to Baldridge, which had not previously been conveyed by the Cattle Company."

We see, therefore, that the Circuit Court of Appeals disposed in its opinion and by its decree of two lots of land, the one conveyed by the deed of December 7, 1911, and the other conveyed by the deed of August 25, 1914.

The Davidson section was conveyed to Baldridge and Reid by deed dated the 18th day of October, 1913. The legal title to this tract was never in the Reid Cattle Company; it was paid for by money of the Cattle Company, and as to the Davidson tract the theory of the appellee was not the same as applicable to the other tracts. The

theory of the bill as to the two tracts mentioned in the opinion of the Circuit Court of Appeals was that the Reid Cattle Company was the beneficial owner because title to the said two tracks was conveyed by the Reid Cattle Company to Reid and Baldridge without the payment of any consideration by anyone, and that the lands were held intentionally by the said Reid and Baldridge as trustees for the Reid Cattle Company; whereas the theory of the appellee as to the land covered by the Davidson tract was that Reid and Baldrige held the land for the benefit of the Reid Cattle Company because the land was paid for by funds of the Reid Cattle Company, *as recited by the deed conveying the same from Davidson to Reid and Baldridge.* (P. 48, fol. 51, Record on Appeal to Circuit Court of Appeals).

The theory of the appellee as to the Davidson tract was that the payment by the Reid Cattle Company of the consideration created a resulting trust in favor of the Reid Cattle Co., and therefore the date of the loan by the National Park Bank had nothing to do with the case as far as the Davidson tract was concerned.

The District Court so found and the Circuit Court of Appeals in its opinion said nothing about the Davidson Tract. To say now that it intended to reverse as to the Davidson Tract because it was deeded to Reid and Baldridge before the debt was contracted entirely overlooks the important fact that it was always in equity the property of the Reid Cattle Company because it was paid for by the Cattle Company.

Since the appeal was taken from the entire decree of the District Court which disposed of these three separate tracts of land conveyed by three separate deeds, and since nowhere in the opinion the Davidson section is mentioned by name, nor is

the deed which conveyed it referred to, it is difficult to see how anyone could gather that the Court reversed, or intended to reverse, the decree in so far as it related to land included in the Davidson section. Rather does the reading of the opinion give the view that two sections of land were the subject of litigation and that two sections were affected by the decree of the Circuit Court of Appeals. If the mandate and the judgment of the Circuit Court of Appeals are read, it would certainly be a difficult matter for the District Court to act and dispose of the Davidson section; and in fact it appears in the petition for the writ of mandamus that the City of Fort Worth, when it moved for judgment in the District Court on the mandate, made no reference whatever to the Davidson section, and in fact did not know what to do; and the District Court has since taken no action pending this application.

No case precisely in point, holding that such a judgment as was rendered by the Circuit Court of Appeals is not a final judgment, has been found; but under the rule laid down by the text books, it is quite clear that this judgment was not a final judgment, because it did not dispose of all the issues which were raised by the pleadings and which were disposed of in the District Court and which were properly before the Circuit Court of Appeals for review.

Freeman on Judgments, Vol 1, Sec. 34, reads as follows:

> "The general rule recognized by the courts of the United States and by the courts of most, if not all, the states is that no judgment or decree will be regarded as final within the meaning of the statute relating to appeals, unless all the issues of law and fact necessary to be determined

> were determined and the case completely disposed of so far as the court had power to dispose of it."

In Black on Judgments, Sec. 24, page 30, the following statement of what constitutes a final judgment is given by the text writer:

> "So, if there are several issues of fact in the same controversy, the decision of one of them, leaving the others undetermined, is not a final adjudication, for there cannot be two final judgments in the same action."

Tested by these rules, the judgment entered in the Circuit Court of Appeals was not a final judgment.

The answer of the Judges of the Circuit Court admits that at the term at which the judgment was rendered the Court's attention was called to the fact that the Court had not disposed of the Davidson section, but minimizes the fact by stating that it was only by one sentence in a twenty-four page printed motion. This, it is submitted, is not quite accurate. The attention of the Court was called to this matter specifically by a numbered paragraph and is found on page 2 of the motion for rehearing and reads as follows:

> "4. No disposition is made in the judgment of this Honorable Court, as disclosed by the opinion, of the lands conveyed to Reid and Baldridge by J. W. Davidson for a consideration paid by the Reid Cattle Company."

So that at that term of court, the Court's attention was called to the claim now made, and the Court did not, by a memorandum, enlighten counsel or the District Court or make any statement that it was intended to dispose of the Davidson

section. The motion so made was denied, without opinion.

Not even the opinion itself, when considered with the record on appeal in the Circuit Court of Appeals, discloses that there was a final disposition made as to more than two tracts of land. No one reading that opinion could gather that it was the intention to reverse the judgment of the District Court as to the Davidson section. How could any one imagine that? It is not referred to in the opinion, in the judgment, nor in the mandate, and it is only at the present time that any idea as to what the Court intended has been known to counsel or to the District Court, that it was the intention of reversing the decree in so far as it affected the Davidson tract. If it be that the Court intended to reverse the District Court decree in so far as it concerned the Davidson tract, counsel for the prevailing party, the City of Forth Worth, never knew it, because when he moved for judgment he never referred to the Davidson tract.

Since the Davidson section was purchased by the funds of the Cattle Company, as stated in the deed conveying the property from Davidson to Reed (p. 48, Record on Appeal), and since title to this tract never was in the Cattle Company, as title to the other tracts was, and since the decree of the District Court in favor of the appellee as to the Davidson tracts rests upon an entirely different state of proof and upon an entirely different theory of law, it does seem that, had the Court intended to reverse as to the Davidson tract, some mention of the Davidson tract would be made in the opinion.

At any rate, it is the judgment and the mandate of the Circuit Court of Appeals which is

controlling. The bill made claim as to three tracts of land. The judgment of the District Court made disposition as to these three tracts of land, awarding title to the appellee. An appeal was taken from the entire District Court judgment to the Circuit Court of Appeals, and the Circuit Court of Appeals, by its judgment, made disposition as to but two tracts of land. How can it be said that the entire appeal has been disposed of and that the judgment of the Circuit Court of Appeals is a final judgment?

The statement in the answer that the case has been fully disposed of is only correct because the Circuit Court of Appeals refused to proceed and declined to grant the motion for rehearing. And if it has been finally disposed of, it is only because the Judges of the Circuit Court of Appeals have stated now, in their answer, that it was their intention to dispose of it, whereas the opinion of the Circuit Court of Appeals shows that they thought that all the land in litigation was covered by the two deeds referred to in the opinion, mandate and judgment, when, in fact, the land in litigation was covered by three deeds.

Furthermore, the reasoning contained in the answer that it was intended to reverse the judgment of the District Court as to the Davidson tract overlooks the fact that the Davidson tract was always an asset of the Cattle Company, because it was purchased with the money of the Cattle Company and is so stated in the deed of conveyance, and therefore the date of the loan to the National Park Bank is utterly immaterial.

POINT III.

The writ of mandamus, as prayed for in the petition, should issue.

The writ of mandamus should issue, requiring the entry of judgment in the Circuit Court of Appeals, which judgment should be a final judgment, disposing of the entire case and all issues involved in the action and brought up for review to the Circuit Court of Appeals.

All of which is respectfully submitted.

LOUIS F. DOYLE,
I. H. BURNEY,
R. W. FLOURNOY,
Attorneys for Petitioner.

LOUIS F. DOYLE,
EDWIN V. GUINAN,
Of Counsel.